United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

77-7121

United States Court of Appeals

FOR THE SECOND CIRCUIT

DORALEE ESTATES, INC.,
Plaintiff-Appellee,

—against—

CITIES SERVICE OIL COMPANY,
Defendant and Third Party Plaintiff-Appellant,

—against—

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,
Third Party Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE

UNITED STATES COURT OF APPEALS
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The judgment in favor of Doralee against Cities Service should be affirmed in all respects. The plaintiff proved each of its causes of action against Cities Service. The jury's award of compensatory and punitive damages were appropriate and the amount of damages in each instance was in full accord with the proofs. All of the jury's findings were in accordance with the weight of the evidence, and, in any event, the defendant never invoked the trial court's discretion for a new trial, for any reason, pursuant to the provisions of FRCP 59(b). Justice was done in all respects.

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* Superceded by Fed. Rules of Evid. 103(a)(2)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-7121

DORALEE ESTATES, INC.,

Plaintiff-Appellee,

v.

CITIES SERVICE OIL COMPANY,

Defendant and Third-Party Plaintiff-Appellant,

v.

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,

Third-Party Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE DORALEE ESTATES, INC.

I. STATEMENT OF THE CASE

This oil pollution property damage action, in the United States District Court by virtue of diversity of citizenship, was tried in the Southern District of New York before Judge Richard Owen and a jury. After nine full days of trial and 1156 pages of testimony[1] the jury found for the plaintiff and awarded it the sum of $60,000 for compensatory damages and the further sum of $200,000 for punitive damages. The court dismissed defendant Cities Service Oil Company's third party action.

Defendant subsequently moved orally, at the conclusion of the trial, ". . . to set aside the verdict both as to compensatory and punitive damages and for judgment n.o.v." (A1323). The court denied the motion (A1324) and subsequently denied a written motion to reduce the amount of the award of punitive damages (A1357), holding that:

> "Although leave was granted to Cities Service to brief the question of excessiveness of the jury's award of punitive damages, no precedents are called to my attention which suggest its excessiveness, and having in mind the record upon which the jury based its award, I cannot conclude, as a matter of law, that it was excessive. The motion to reduce is denied." (A1360)

Cities Service sought no other post-trial relief and made no Rule 59 motion for a new trial.

II. ISSUES ON APPEAL; CONTENTIONS OF PARTIES

Defendant-Appellant Cities Service contends in its six points

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[1] Thirteen witnesses testified. Over one hundred thirty exhibits were offered during the trial. Three depositions were read into the record.

on appeal that the plaintiff failed to make out a prima facie case; that the verdict was against the weight of evidence; that plaintiff was not entitled to punitive damages; that the award of punitive damages was excessive; that the court erred in denying Cities Service additional peremptory challenges during jury selection; and that errors in trial rulings prejudiced Cities Service.

Point I attempts to lump the dual contentions that the plaintiff did not make out a prima facie case, but if it did, the jury's verdict was against the weight of evidence. The appellant argues that it was not liable to the plaintiff under any circumstances since it was not in possession of the polluting premises, and since possession and control of the offending premises is essential to liability.

However, both the record evidence and the law are to the contrary. Cities Service was in exclusive possession of the offending premises from February to October 1973 on its own admission. Its legal argument is erroneous, being grounded on recently overruled and changed state law. In New York, a landlord may be held liable solely on the basis of its covenant to keep the premises in repair. And, even if Cities Service had not been in control of the premises, and even if the New York law had not recently been changed, still, Cities Service had violated an earlier state court consent judgment in which it obligated itself to abate the oil pollution.

Urging in this appeal that the jury's verdict was against the weight of the evidence, without having moved for a new trial pursuant to Rule 59(b), the appellant disregarded the cardinal rule requiring that the evidence be viewed in the light most favorable to the party who secured the verdict. So viewed, the record shows an overwhelming

case of liability for damages, generally reducing all of Cities Service's points on appeal to legal nothingness.

Appellant's references to the "facts" (a) are vague, argumentative and incomplete, and more significant for what they omit than what they include; (b) fail to apprise the reviewing court of the overwhelming weight of plaintiff's evidence in support of its claim; and (c) are replete with self-serving characterizations.

Point III[2] contends that the plaintiff factually failed to establish compensatory damages. It repeats its rejected and unwarranted jury argument that others caused all or part of the pollution to plaintiff's lakes. It further contends that if compensatory damages were to be awarded, the evidence did not support the amount of the award. But the record provides ample, and in fact, a mathematical basis for the jury's award which the trial court found appropriate. Cities Service omitted to challenge the amount of compensatory damages pursuant to Rule 59(b), did not invoke the trial court's discretion, and should not be permitted to petition this court to review and analyze the damages evidence in the posture of a trial court.

Point IV is a claim that punitive damages should not have been submitted to the jury. However, the record demonstrates through no less than Cities Service's own documents and admission that the pollution of the plaintiff's lakes had been known to its highest levels of management for over a decade and that its general counsel, the Tulsa home office and the Boston and New Jersey regional offices and management were not only aware of the pollution, but actually ratified continual pollution even after commencement of this action.

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2 Point II deals with the third party action; it is irrelevant insofar as this brief is concerned.

The record indicated that Cities Service joined in the perpetration of a fraud upon the New York State Department of Environmental Conservation, violated the State's pollution laws which constituted a misdemeanor, and intentionally violated a state court abatement order to which it had actually consented with approval of its general counsel.

Cities Service's motion to reduce the punitive damages award was reviewed by the trial court, which, in exercising its discretion, and "having in mind the record [could not] conclude that it was excessive" (A1360).

Point V claims that it was reversible error for the trial court to allow the defendant and third party defendant five peremptory challenges instead of the six requested. However, the ruling was well within the court's discretion. Cities Service had waived one of its challenges anyhow, and since it had asked for but one more challenge, the whole point is meaningless and without merit.

Point VI complains, "shot gun-wise", that the trial judge made numerous rulings which resulted in prejudice to Cities Service. These "errors" run the range from (a) a claim to a right to a new trial because the defendant summed up its case in the afternoon and the plaintiff summed up its case on the following morning, (b) to a claim that the court should not have permitted the plaintiff to amend its complaint to conform with the proof (in spite of the fact that the court permitted Cities Service to amend its answer to conform to the proof).

Additional unjustified trivial claims of error were made which, if substantiated, were harmless at best.

III. COUNTER STATEMENT OF FACTS

A detailed and lengthy counter statement of facts is necessary since the appellant's brief is interspersed throughout with unfair, unsupported statements and improper characterizations of evidence (i.e., p. 6, alleged fishkill, when state employees testified that thousands of fish were dead; p. 6, it was established that discontinuance of the oil plant was accomplished on February 10, 1973, when at least three witnesses testified that discontinuance was much later; p. 7, characterizing testimony of Ted Hudson, an employee of the New York State Department of Environmental Conservation with "lack of reliability"; p. 7, "alleged presence of oil", the presence of which was squarely testified to by at least four or five witnesses and acknowledged in a score of documents; p. 7, a release exonerated Cities Service from all liability through October 24, 1972 -- when in reality the jury found, in writing, that the release was effective April 25, 1972; p. 9, again, alleged oil spills; p. 9, characterization of Motl's testimony as "not worthy of belief"; p. 9, MGO and its personnel had vacated the plant on February 10, 1973, when there was substantial evidence with respect to a later date -- during the summer of 1973; p. 9, a letter addressed by New York State to MGO was offered only against MGO -- the letter did not bind anyone, it was a "contemporaneous memorandum of circumstances" (A406); p. 11, so-called fishkill; p. 12,

Sedlack was "a wholly disinterested witness," even though, on the last day of trial, he was first advised at 6:30 a.m. of that date that he would be a witness for Cities Service; p. 12, appellant's exaggeration and unfair inferences of facts by claiming that Sedlack testified that his company removed the very stumps and muck that plaintiff's witness Rosch said would cost $21,000 to remove -- the fact is that the pipe being laid did not go through the lake bed but on one end it was pretty close (A1150). It was only on one side that stumps were pushed out (A1149); p. 13, asserted that plaintiff's expert was in no way concerned with how plaintiff's bungalows compared with other bungalow colonies. This was not so (A546); p. 14, defendant states that "there was also proof in the record of oil emanating from another petroleum plant . . . as well as from the highway adjacent thereto" -- this was not even an exaggeration -- it was a false statement and is dealt with fully in the ensuing point concerning compensatory damages; p. 15, the case was tried when newspapers and broadcast media were replete with items involving other oil pollution -- Cities Service had the audacity to include this in its brief, although such matter did not appear in the record, and although this court denied Cities Service's motion to supplement the record to include these extra recordial assertions.

In the light of the rule that all contested issues of fact were determined in favor of the plaintiff, and that the plaintiff is entitled to the most favorable fair inferences from the proof, the facts in this case are as follows:

A. The Witnesses and the Depositions

(1) ROBERT ROSCH. Robert Rosch was an excavation contractor

who had attended two years of college (A194-A195). On September 19, 1972, he inspected the premises owned by the plaintiff known as Doralee Estates at the Cold Spring Road, Monticello, Sullivan County, New York (A195). At the time, a representative from the New York State Department of Environmental Conservation was also at the premises (A197). Two of the lakes on the plaintiff's premises had been drained (A197). Lake #1 was about 3 acres in size and lake #2 was about 3/4 of an acre (A198). Without objection, Rosch testified that he "dug some little holes in the ground to the depth where the oil had penetrated", and made a notation as to where each hole was dug. He recorded the location and depth of each hole where there was oil (A198). The notes were made on a topographical map supplied by the man from Environmental Conservation, who made the marks as the digging went along (A200). Oil was found as deep as 7" (A210). It would cost $21,000 to remove the oil soaked bottom of the lake (A202). Both the estimate, plaintiff's exhibit 1 in evidence, (E1), and the map marked with the locations of the holes dug, plaintiff's exhibit 1A, (E2), were received in evidence.

(2) THEODORE R. HUDSON. Hudson was an employee of the New York State Department of Environmental Conservation as an investigator of water pollution (A226). In 1972, he had records indicating a number of inspections at the plaintiff's premises and the defendant's oil plant (A227). The oil plant consisted of four large storage tanks suspended above the ground (A227). The Cities Service emblem was painted on the trucks and tanks in the

yard (A228). On September 19, 1972, Hudson was at the Doralee premises as the result of a complaint (A229). He met Rosch there fortuitously (A229) and was present when the holes were dug and the oil found (A229, A231). He verified the presence of oil on the lake bottom (A231). Hudson personally traced the oil back to its source -- to the defendant's oil plant through a spillway and a culvert. The oil was specifically traced by use of a fluorescent dye (A233).

In response to the court's inquiry, Hudson showed that the dye test indicated that a liquidspilled at the edge of the oil plant would reach the plaintiff's lakes in 5 to 7 minutes (A234). Without objection, although Cities Service later complains that testimony prior to April 25, 1972 should not have been admitted, Hudson testified that on April 13 and April 20, 1972, oil was present on the lake (A237). On December 12, 1972, oil was found in the plaintiff's lake (A238).

Despite Cities Service's contention that Hudson stated that oil was lighter than water, Hudson had merely mis-spoken and the mistake was promptly corrected (A239). In September of 1972, oil was overflowing into the plaintiff's premises (A240). In the mid summer of 1973, "large quantities of oil" were being spilled, as the plant was being dismantled (A242). Hudson explained presence of oil on the lake bottom (A242-A243).

On cross-examination, Cities Service inquired of Hudson with respect to oil spillage prior to April 25, 1972 (A249-A252). Hudson testified that in addition to seeing oil at the bottom of the lake, he smelled it (A255). On cross-examination, new subject

matter relating to events prior to April 25, 1972 was elicited (A265-A267). Detailed elicitation of new subject matter prior to April 1972 continued (A271-A272). Oil was observed on December 12, 1972 (A278, A283).

Hudson testified that although some neighbor's small septic tanks had overflowed (A307), they had been repaired by the end of 1972 (A310).

(3). DEPOSITION AND TESTIMONY OF LEROY C. LANGBEIN. Cities Service's trial counsel disgracefully and unsuccessfully attempted to disown Leroy C. Langbein as a deposition spokesman for Cities Service although Mr. Colin himself had produced Langbein at Colin's own office pursuant to a notice to depose Cities Service (A311-A315). The trial court was necessarily annoyed by this (A317), and Mr. Colin acknowledged that he knew Langbein for at least 24 years (A318). Probably, this was an attempt to avoid "corporate management" in the pollution which had to be proved by the plaintiff as part of its case of punitive damages.

In any event, Langbein called himself a field engineer, although he was not a licensed engineer (A321). He had been a manager of construction and maintenance for the Cities Service New York region (A321). He testified that he had more knowledge of the subject matter of this case than anyone else in Cities Service (A323). Numerous documents were produced at the deposition which will be discussed in "Documentary Evidence", infra.

Langbein was called as a witness for the plaintiff and testified "live". He had been with Cities Service for 44 years

and in 1972 he was in charge of the maintenance of Cities Service's owned or controlled properties (A449); he was involved in the supervision of maintenance of Cities Service's plant at Monticello, certainly for structural repairs (A450). In August of 1972, he had corporate responsibility for that area (A452). This is significant, later, on the issue of punitive damages. Langbein was aware during April 1973 that the New York State Department of Environmental Conservation made a complaint with respect to oil spillage emanating from the plant and seeping into the plaintiff's lakes (A454). There was communication between MGO and Cities Service and inter-company correspondence in Cities Service as to who should pay the $500 fine (A455). Cities Service squarely acknowledged that if it had been present at the hearing, the fine would have been $2500 (A457). During examination of Langbein, Cities Service's trial counsel insisted reading into the record a portion of plaintiff's exhibit 4 in evidence (E21), and specifically read to the jury an acknowledgement of Cities Service's liability in this case.

> MR COLIN: "At any rate, I do not think we are getting any bargain in giving this land to MGO if we are liable for all past sins of MGO and the predecessors" (A460; E21; Cities Service's inter-company memorandum dated April 8, 1973, signed by Roy Langbein).

Langbein acknowledged that in June of July of 1973 the oil saturated earth at the plant which Cities Service caused to be removed was so saturated at places as deep as 3 feet (A461). Langbein affirmed that Cities Service acknowledged a duty to

comply with the New York State Department of Environmental Conservation pollution abatement order (A468-A469). Langbein was directed by "Tulsa" (meaning the home office of Cities Service), finally, to comply with the State pollution abatement order (A473-A474). Langbein testified that his files confirmed that Cities Service built the very catch ditch which was the conduit for pollution from the plant to plaintiff's lakes (A486).

A most crucial part of Langbein's testimony was in response to a question put to him by the court(A487)

> "THE COURT: . . . the question is whether Cities Service owning a tank plant like that would have the right to go in and inspect it to make sure the premises were kept up in good order.
>
> A. They had the right but I didn't exercize it too often.
> THE COURT: We have an answer.
> Q. How often did you exercize it?
> A. Never."

The legal arguments concerning "control of the premises" following these questions were of utmost significance. Langbein conceded that it might have been March 1973 when the plant closed down and not February 10, 1973, the date which Cities Service claims in its brief is "conceded" (A491-A491).

In the absence of the jury, the cout put on the record reasons for some of its rulings. The court indicated that documents concerning the Environment Conservation hearings and fines were admissible since

> "The jury should be permitted on this record to consider the questions as to whether or not Cities Service was using Monticello as a front for its operation and deliberately stayed away. I think this is some evidence, given all of the evidence we heard yesterdy from Mr. Sam Greene as to the degree of participation of Cities Service in the maintenance and upkeep, etc., as to the Monticello Plant" (A493).

(4). MATTHEW PETER MOTL. He lived at Monticello and from 1961 to 1969 was in the retail fuel oil business (A344). He purchased his fuel oil from Cities Service (A345) at the MGO plant. Even though he sold his business in 1969, he continued to visit the oil plant monthly until the plant closed in the middle of 1973 (A351). This was to pick up his accounts receivable which were collected for him by Cities Service (A346). Motl testified that from April 1972 to the middle of 1973, he had observed oil trucks being loaded at the premises on a number of occasions (A353). He testified as to oil spillage occurring during the loading of trucks, and as a result of the breakdown of tanks (A353-A354). While the plant was being dismantled, Motl saw "a lot of oil all over the yard" (A354). On cross-examination, Motl testified again that he had visited the plant until the summer of 1973 to pick up his accounts receivable (A360-A361).

Cross-examination of Motl indicated that he observed the presence of oil spillage in January 1973, March 1973 and April 1973. He testified that the plant was still being used in April 1973 (A370). Although Cities Service's counsel had objected to Motl's testimony with respect to oil spillage before 1972, on cross-examination Cities Service inquired respecting Motl's own spilling of oil at the bulk plant before he sold his business (A376-A379). The prior objections were certainly waived by this inquiry.

(5). DEPOSITION OF JOHN KWAK. John Kwak, an assistant engineer for the New York State Department of Environmental Conservation, was examined at the New York State Department of Health in Monticello, Sullivan County, on September 27, 1973 (A380). The State's water pollution case report and other documents were obtained (A382). The State's water pollution report and the State's fishkill report were discussed (A380-A385).

It was stipulated by counsel that a pollution hearing was conducted before the Department of Environmental Conservation in New Paltz, New York on March 29, 1973 (A329). Kwak's notes indicated that an informal hearing was conducted on April 4, 1973 (A393). At that time, Sam Greene agreed to the consent order (A394-A395; E45). The most important of Kwak's testimony was that any oil spilled on the bulk plant premises would result in pollution of the plaintiff's lakes (A397-A398). This was because a "so-called oil trap" (the exact words of the witness) was grossly insufficient to handle the spillage (A399, A403). Kwak had testified, without objection, that in April of 1972 he saw dead fish and fish dying at the lake (A385-A386).

(6). SAM GREENE. The plaintiff called Sam Greene, who was third party defendant Monticello Gas & Oil's manager from 1968 to the time of trial (A415). Greene was present at the Department of Environmental Conservation pollution hearing in April 1973 (A418; 1972 in the record is merely a mistake). Greene kept in touch with Cities Service concerning the hearing (A419). Greene wrote to Langbein expecting Cities Service

to honor the consent order (A420). In April 1973, Greene conceded that "the land upon which this bulk plant operated was saturated with oil (A420). He also conceded that Monticello Gas & Oil consented to the state order (A421), which acknowledged a continued pollution of the plaintiff's property. The consent order (E45) recited that "New York State Department of Environmental Conservation has documented a continuing discharge of oil from [MGO's] plant in Monticello . . . into the Doralee lake". He testified that Cities Service owned the bulk plant (A423), together with the bulk tanks, pumps and buildings (A424-A425). Cities Service paid for the painting of MGO's trucks with the Cities Service emblem (A426), and for a Cities Service sign at the plant. Greene said that he knew of his own knowledge that State environmental officials from time to time had been at both the MGO plant and the Doralee lake (A431). Greene explained that at some point in time, MGO was a "commission agent" for Cities Service; this was an arrangement where MGO was "given a commission to deliver gasoline only to Cities Service commercial accounts and service stations" (A432-A433); that payment was made by the customer directly to Cities Service (A433). This was especially important since Cities Service stated in writing on April 23, 1973 that from 1957 to that time, MGO was Cities Service's commission agent and branded jobber (pltfs. exh. 6 in evid.; E28). On cross-examination, Greene testified that no gasoline other than Cities Service's brand was ever sold out of that plant; that it was inpermissible for MGO to sell any other

gas under the terms of their agreement (A435-A436). At that juncture, Cities Service's own counsel read into the record a part of the Cities Service-MGO lease (A440; pltfs. exh. 55 in evid.; [E55]). That document (E59) stated:

> "In the event any municipal or governmental authority should hereafter require any alteration, improvement or structural addition that same shall be made at the sole cost and expense of landlord".

This is especially significant in Point 1(A), infra.

Roy Langbein covered MGO with respect to maintenance of the plant (A443). MGO had to get permission from Langbein to repair the premises. Cities Service had paid for the very culvert which diverted the oil from the plant to the plaintiff's lakes. Cities Service supplied pans to contain oil drippings (A444). All major repairs were made and paid for by Cities Service (A445).

(7) WILLIAM EDISON. William Edison, plaintiff's real estate expert, is a licensed real estate broker in the Monticello area and has been for 11 years. Seventeen licensed salesmen are associated with his office. He is a member of the Sullivan County Board of Realtors, State Board of Realtors, National Board of Realtors, and other appraisal societies and organizations. He is appointed at least 50 times each year for the Surrogate Court in Sullivan County in relation to estate valuation (A496-A498).

In the Summer of 1976 he studied the plaintiff's rent rolls and inspected the property. He inspected the property again in the Fall of 1976 (A498-A499). The property consists of 26 acres which include 26 family units for summer rental and 3 mobile homes (A499). A typical unit consists of a kitchen, small living room, bathroom and 1 to 3 bedrooms (A499-A500). There is a swimming pool, recreation facilities and two lakes. Four hundred eighty feet of the property line adjoins one of the newest and nicest apartment complex in Monticello (A500).

The bungalow units were all lower than the lake (A501). This was the only property in the area where the assessment had actually gone down in value (A501).

Edison had inspected comparable bungalow colonies in preparation for his testimony, and found that in each and every instance, the assessments of the other bungalow colonies had gone up (A502). Maintenance was good.

The plaintiff furnished Edison with rent rolls from 1967 through 1975 (A508) and Edison made a survey of rents at comparable bungalow colonies in the area (A509). Edison testified that the Doralee rents where much less (A510) than those obtained at comparable facilities. In 1976 the other bungalow colonies got $1,300 a year for a two-bedroom unit and Doralee got $920 a year. With respect to the smaller units, Doralee averaged $725 and the other units received $1,100 (A511). The other bungalow colonies had been raising the units $150-$175 a year, while Doralee could at best raise the rents $50 (A511). Doralee's exact rents were later tabulated, and as tabulated, received in evidence (pltf's. exh. 66 in ev. [E98]).

This exhibit shows Doralee's rents from 1973 through 1976 with respect to each of its 23 rental units. The increases each year were small or nominal during that period.

On cross-examination, Edison repeated that his professional engagement was "to find comparable units and ascertain their rents in relation to rents at Doralee Estates" (A514). During a lengthy 60 page cross examination, the cross-examiner fully elicited all the bases for Edison's direct testimony and opinions. On cross-examination, Edison testified that "the upper and lower lakes were polluted with oil when I was there last year" and that he specifically saw oil slicks on the water in July 1976. He described the oil (A543, A544).

Although Cities Service contends in its brief that Edison's testimony as to rentals of other bungalow colonies

resulted from hearsay, the subject matter was fully developed by the cross-examiner asking unobjected to hearsay questions himself. For instance, "did you ask the owner of Woodland Colony what rents were charged for years prior to 1976; did he give you the rent; what did he tell you; did you ask him for specific rents for 1975; did you ask him for specific rents for 1974"(A534). Cities Service's trial counsel, as cross-examiner, asked the same hearsay questions of Edison concerning the other comparable bungalow colonies (A536, etc.).

On cross-examination, the plaintiff's basis for damages was fortified when counsel specifically elicited, as new subject matter, that "anyone who invests in a piece of income real estate tries to get the best rent he can...and that the owner of the five comparable facilities and Doralee were all trying to get the best rent possible from their investment" (A538).

(8) DEPOSITION OF JOSEPH G. SPODARYK. Joseph G. Spodaryk was examined at the New York State's Environmental Conservation Laboratory at Avon (near Rochester) New York on June 18, 1974 (A582). He was employed by the Department as an analytic chemist and had previously been employed by the State Conservation Department. He had a Bachelor of Science degree in chemistry and had attended graduate school (A583).

Spodaryk had made about 125-150 fish kill studies during his tenure with the Department (A584). In April 1972,

he performed a fish kill study concerning Doralee's lakes (A585). He personally inspected the Doralee lakes and water samples were taken in his presence (A586). Notes were made (A586). There was an oil film visible on the surface of the water (A587). He traced the oil to the defendant's plant to the culvert. He saw dead fish (A587). A final report was made in the ordinary course of business (later received in evidence -- pltf's. exh. 26 in ev. [E64]). The report was detailed, indicating that oil was the only pollutant observed. The number of dead fish was estimated at 2000 (A595). These questions had been put to Mr. Spodaryk by Cities Service.

(9). DORA HUSS. She was the president of the plaintiff corporation and through her, photographs of the premises were received in evidence, indluding the lakes. Some of the photcs showed oil on the lake (A627-A635). Some of the pictures showed oil slick (A636). Her testimony concerning the state court settlement is summarized later in this brief in the argument. She testified as to her rentals (A635). She testified as to oil on the lake in December 1976 (A778). She described a dam and baffle-boards which controlled the height, and therefore the area, of the lake (A1140-1142). She stated, contrary to Sedlack, that when the Village did work upon her property they did not work in the lake, only in the area alongside it (A1144-A1145).

(10). ALVIN ADLER. The defendant called Alvin Adler, an engineer. He was called to give a counter-estimate of the cost of removing the oil saturated bottom of the lake, but when shown a picture of the lake with numerous tree stumps at the bottom, he

testified that had he seen that picture beforehand, his testimony would have been substantially different (A1121).

(11). WILLIAM J. RIEBER. He was the defendant's real estate expert (A927), ostensibly called to counter Edison's testimony. On cross-examination, he was compelled to concede that some of the other facilities were not in such good neighborhoods, even though they received larger rents than Doralee (A966-A969). He was equivocal and evasive responding to questions put to him on cross-examination -- very equivocal (A970-A971). On cross-examination, he conceded that Doralee's geographical location was a favorable one (A973-A976). He had not testified this way during direct examination.

(12). JAMES SEDLACK. Sedlack was called by the defendant as a rebuttal witness. The first time he knew he was going to be a witness in this case was 6:30 am. of the morning he was to testify (A1150). He had never spoken to anyone about the case before (A1150) and he testified as to his presence on the premises in the fall of 1972 when the lake was drained. He said he did not see any oil at that time (A1149).

B. The Documentary Evidence[2a]

(a). On September 19, 1972, an estimate was made showing the cost of removing the oil saturated bottom of the plaintiff's lakes was $21,000. The estimate included exact measurements of the depth of the oil soaked bottom at 6 different locations on the plaintiff's property (E1, E2).

[2a] Documentary evidence, other than photographs, have been reproduced in a separate appendix entitled "Exhibits". The exhibits are referred to that exhibit appendix by references prefixed by the letter "E". For instance, [E22] refers to plaintiff's exhibit 5 in evidence, Cities Service's construction requisite.

(b). The State made a water pollution case report on December 18, 1972, in which it was reported, amongst other things, that the oil discharge was injurious to fish life and made the waters unsuitable for bathing (E8). It stated that not only was defendant's oil trap not maintained -- it was not operated at all (E9). It reported oil spills on September 19, 1972, when Ted Hudson was on the premises, and on other earlier and later dates.

(c). In a Cities Service inter-office memorandum on April 8, 1973, it appeared that Cities Service knew of the state pollution hearings being conducted with MGO, its tenant, appearing for the property owner. Cities Service knew that if it had been present, the fine would have been more than $500, which Cities Service was supposed to pay, and "in fact, the law provides up to $2500 per day" (E20). It acknowledges that as of that date there was still gasoline in the tanks and it was going to be a problem to remove them without spillage. The recommendation was to float the oil to the top of the tanks and then skim the oil off (E20). This was not done and caused additional aggravated pollution to the plaintiff's lake. Cities Service acknowledged that it will take $6,000 for $7,000 to comply with the state citation (E20). In January of 1973, Cities Service was concerned about its acknowledged obligation to comply with the state court settlement. It was concerned that a proper oil separator would cost $46,000 (E22).

(d). On April 23, 1973, Cities Service's inter-office memorandum acknowledged pollution of the plaintiff's property as early as 1967 -- 10 years before the trial. It stated that since October 1957 MGO, the third party defendant, was Cities Service's

commissioned agent and branded jobber (E26).

(e). General counsel to Cities Service "called the shots" with respect to this case (E30).

(f). On May 10, Cities Service contracted the dismantling of the plant and delegated a Mrs. Ethel to pump out the bulk tanks before dismantling them.

(g). MGO expected the state fine to be paid by Cities Service (E33). Cities Service let contracts to remove the oil soaked earth (E34, E35, E37, E38). The oil saturated earth was as deep as 3 feet at some places (E39).

(h). Cities Service acknowledged that the $6500 spent in removing the oil saturated earth was in compliance with the state pollution agency citation (E40). On July 31, 1973, Cities Service again acknowledged that"the total cost of the clean up operation . . . was required to comply with the State of New York, Department of Environmental Conservation, order on consent (E41). This was further acknowledged on August 31, 1973 (E42).

(i). On April 20, 1973, the State Environmental Conservation consent order was sent to Cities Service for compliance (E44). Paragraph "X" of that order clearly was a direction to Cities Service to comply (E46). In the consent order, it was emphasized that "when these tanks are removed, any remaining oil will be taken out and all due precautions will be taken to prevent spillage of remaining oil" (E48). No precautions were taken and some of the worst spills occurred as a result thereof.

(j). The lease between Cities Service and MGO was received and included a provision which stated that the landlord "shall at

all times have the right to enter the demised premises for the purpose of inspection, alteration or repair . . . " (E105). Sewerage repair was specifically contemplated (E107). Other documents were received with are referred to, and quoted from in detail in the ensuing argument.

IV. ARGUMENT

1. THE PLAINTIFF PROVED BOTH A PRIMA FACIE AND AN OVERWHELMING CASE OF LIABILITY AGAINST THE DEFENDANT IN NUISANCE, TRESPASS, GROSS NEGLIGENCE, AND VIOLATION OF A STATE COURT SETTLEMENT AGREEMENT TO ABATE POLLUTION. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S POST TRIAL MOTION FOR JUDGMENT N.O.V.

Cities Service's main thrust on this appeal is that plaintiff failed to make out a prima facie case on any theory. This point is, with respect to all causes of action, predicated upon factually erroneous contentions that, as landlord, Cities Service did not occupy or control the bulk oil plant premises -- and that consequently, it cannot be liable to the plaintiff for damages sustained by oil pollution emanating from the bulk oil plant.

The fact of the matter is (a) that it did actually solely occupy and control the plant for at least six months, and (b) even if it hadn't, Cities Service's lease obligation to inspect and repair, as landlord, is an independently sufficient basis for liability, and (c) in any event, by virtue of the settlement agreement, equivalent to a mandatory injunction of the state court, entered into in April 1972, Cities Service directly obligated itself with a duty to abate the oil pollution.

And, upon an erroneous factual hypothesis, Cities Service deliberately[3] urges the application of state law which formerly held that a landlord's covenant to repair imposes no liability in tort to a third party. But this is no longer the law -- the present law is to the contrary.

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[3] This harsh language is carefully considered. Cities Service's trial counsel, at the trial, in moving to dismiss, cited both Putnam v. Stout, infra, and Cullings v. Goetz, infra (A857). In its brief to this court, Cities Service carefully omits reference to these cases.

A. Cities Service Seeks Reversal Upon Overruled State Law.

Cities Service cites Dick v. Sunbright Steam Laundry, 307 NY 422 (1954) in an attempt to convince the court that the New York State Court of Appeals presently holds that tort liability of a landlord to a third party "is an incident to occupation and control . . . , which is not deemed reserved by a covenant to repair" (see appellant's brief, p. 21, and Dick v. Sunbright Steam Laundry, supra, at 424 whereat the Court of Appeals attributed this recently overturned rule, by direct citation, to the authority of Cullings v. Goetz, 256 NY 287 [1931]).

But Cullings v. Goetz, supra, has been specifically overruled by the New York Court of Appeals in Putnam v. Stout, 38 NY 2d 607 at 617 (1976): "We overrule Cullings V. Goetz, supra, and adopt the Restatement . . . ". The New York rule now is ". . . that a landlord may be liable . . . solely (emph.supp.) on the basis of his contract or covenant to keep the premises in repair (Putnam v. Stout, supra at 618). The court charged accordingly (A1268-A1269).

In the case at bar, Cities Service agreed in writing to maintain sewers, to make other enumerated repairs including repairs to the bulk storage and pumping facilities (E107). Cities Service "at all times ha[d] the right to enter the demised premises for the purpose of inspection, alteration or repair . . ." (E105). And in practice, Cities Service representatives were regularly at the offending plant (A443). Roy Langbien of Cities Service, who testified at the trial, "covered [the tenant] as far as maintenance of the plant was concerned" (A443). Specifically, Cities Service

paid for the culvert (A444) -- the very sewer under the road which carried the oil to plaintiff's property. In fact, Cities Service constructed the sewer (E139). "They paid for pans . . . put under . . . loading racks to contain any of the drippings of oil" (A444). And before any of that work was done, Cities Service had to inspect and approve (A444). The liability of Cities Service to the plaintiff is independently justified upon the rule of Putnam v. Stout, supra.

B. Actual Possession and Control of Premises By Cities Service.

MGO's representative testified that "February 10 [1973] is when we moved out in its entirety" (A442). Cities Service vouched for the correctness of this statement (A186). From that time on until October, 1973, Cities Service, landlord, claims it was in exclusive possession and control of the bulk oil plant (A412). The record is replete with proof of continued pollution throughout the Spring of 1973, which resulted in a citation being issued by the New York State Department of Environmental Conservation. The pollution was still going on in March, 1973, as admitted at the hearing (A391-392), whereat it was agreed that "on or before April 1, 1973, M.G.O. will no longer use the Cold Spring Road oil or gasoline storage tank"(E48). At that time, although MGO was no longer the tenant, it, and not Cities Service, appeared at the administrative hearing, and with Cities Servie's knowledge and acquiescence, a consent order was entered into and a fine levied (E20, E40; and see A342).

This was obviously a fraud committed upon the State of New York.

In July 1973, D. O. Koch of Cities Service's home office in

Tulsa wrote a memo concerning the prospective total cost of the clean up operation which Cities Service acknowledged it was required to comply with per the State Department of Environmental Conservation Order (E41).

C. Cities Service Was in Constructive Possession of The Oil Plant by Virtue of Its Undertaking To Abate The Pollution.

Cities Service unfairly claims that "it is self evident" (brief, p. 29-30) that the court treated the state court stipulation as an acknowledgement of operation and control. We agree that as to the period prior to the stipulation to abate, the stipulation is irrelevant with respect to the issue of the operation and control of the bulk plant. But as to the future, said Judge Owen

> "Cities Service . . . committed itself to participate in the operation and control of that premises by agreeing to do certain things" (A329).

This is a correct and obvious observation, appellant's distorted contentions notwithstanding.(A343).

In the state court settlement, the plaintiff agreed to waive

> "future claims against the defendants herein by reason of the operation of their said premises as a bulk oil distribution plant . . . now used in relation thereto for a period of six months . . . terminating on the 24th day of October, 1972, provided that defendants comply with the terms of this stipulation . . . regarding a correction of their premises . . ."
>
> ". . . the defendants shall submit to the court plans . . . for the installation of a system . . . designed to eliminate the discharge . . . of any petroleum products from the defendants' premises on to the lands or lakes of the plaintiff . . ."

> ". . . the defendants undertake and agree to commence work to institute the improvements . . . which work shall be carried out in an expeditious fashion" (E113-E114; all emph. supp.).

The court charged the jury to consider this agreement in determining whether or not "Cities Service undertook to correct the oil spillage" (A1268). If not, the jury was instructed that the verdict must be for the defendant. The charge permitted the jury, if it had seen fit, to ignore the clear and unequivocal language of the agreement. If anyone was aggrieved, it was the plaintiff, which was entitled to a charge that by the language of the agreement, Cities Service legally obligated itself to stop the pollution or to abandon the plant within the stipulated time frame; if it didn't, which it didn't, it would be liable to the plaintiff for all ensuing damages. In no manner was Cities Service prejudiced by submission of this issue to the jury.

2. COMPENSATORY DAMAGES WERE PROVEN BY THE PLAINTIFF AND THE JURY'S FINDING OF SUCH DAMAGES IN THE SUM OF $60,000 WAS IN ACCORDANCE WITH THE LAW AND THE FACTS. THE TRIAL COURT PROPERLY REFUSED TO INTERFERE WITH THE JURY'S FINDINGS.

Defendant contends that compensatory damages were not proven on the basis of its erroneous and improper contention that (a) "without contradiction . . . plaintiff's premises were polluted by several independent causes (appellant's brief, p. 41), and, (b) that the record is devoid of proof separating pollution prior to the state court settlement and subsequent thereto. Defendant also contends, quite erroneously, that (c) it was the plaintiff's obligation under the rule of Hartshorn v. Chaddock, 135 NY 117 (1892), to establish whether cost of restoration or diminution of value would be the lower figure" (appellant's brief, pp 44-45).

A. With Respect to the Contention That Others Caused the Pollution.

Cities Service argues on appeal, as it unsuccessfully argued to the jury, that others caused the pollution. It consistently misquotes or misinterprets the record (i.e., appellant's brief, p. 42, citing A301-302 for the proposition that oil drippings from ordinary traffic on the highway contributed to plaintiff's damages. There is no such proof in the record -- Hudson squarely said "I didn't observe any oil on the road, sir" [A301]). The appellant not only disregards the rule that all issues of fact were resolved against it, but urges upon this court facts which are not even in the record (i.e., appellant's brief. p. 42, citing A273 for the false proposition that "there was proof in the record that there

was another petroleum plant in the vicinity of plaintiff's premises which was also an independent contributor of oil pollution). This record is devoid of any proof that the other oil plant caused any pollution. To the contrary, another oil plant more than a mile away had always been connected to the Village sewerage system (A833).

Defendant's contention that smoke from oil burner chimneys from residential homes caused the pollution is not worthy of discussion. It is just not so (A283).

Cities Service's defense that sewerage, and not oil, was the cause of the problem had little support, if any, in the record and at most a jury question. To begin with, the only time there was ever any evidence of sewerage was during 1972 (A305-A307). But, no claim had been made by the plaintiff for loss of income during the year 1972 (A1236-A1237; E100 [pltfs. exh. 82 for id., black-board argument in summation with respect to damages for lost rentals] E98 [pltfs. exh. 66 in ev., loss of rents, 1973-1976]). The record is clear that the 2 or 3 homes whose septic tanks had overflowed during 1972 had their systems corrected in 1972, and there were no further problems (A310). This area was provided with a municipal sewer system in late1972 (A671-A672, E62).

A United States Department of the Interior "Report of Pollution Caused Fishkill" was filed in April of 1972. It stated, amongst other things, "oil only known pollutant entering watercourse" (Pltfs. exh. 26, E64).

In any event, the record does not show <u>any</u> proof that there was any sewerage of any kind caused to enter the plaintiff's lakes from the winter of 1972 to the time of the trial, January, 1977.[4]

The court charged the jury that in determining damages it was to consider "whether the cause [of damages] was the pollution of her ponds by defendant's oil spillage or from other things defendant urged upon you, such as sewerage, nature of the location, size of the units, etc." (A1281).[5]

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[4] Available evidence that <u>there was not</u> any sewerage problem after the winter of 1972 was suppressed by Cities Service, which caused it to become lost in the "shuffle" of the trial.

Mr. Orseck: I state for the record as an officer of the court that I saw in Mr. Lieber's file . . . a letter from Mr. Colin "Are there any violations?" Mr. Lieber's answer: none.
May I call for the production of those records . . .
I represent to you Judge, that I saw them and I don't have copies, I cannot get them.

The Court [to Mr. Colin]: Go through your correspondence file here and produce that correspondence (A673-A674).

Later in the trial (A724)

Mr. Orseck: . . . Your Honor instructed Mr. Colin to go through his file with respect to the documents I saw to the Department of Health . . . asking about sewer violations.

Mr. Colin: Can't we wait on that . . . I told Mr. Liddle to do it.

Mr. Liddle: We did it and you rested your case. I have the documents.

The Court: Turn them over now.

Mr. Liddle: Can we do that in a recess? They are in a file.

The Court: We will do that at the first recess (A724).

The documents were never produced.

[5] Environmental Conservation employee Hudson personally traced the oil pollution to defendant's bulk oil plant (A232-A233). It was proven out by a fluorescent dye test (A233-A234).

To conclude, defendant's contention that the proof in this case "establishes without contradiction that plaintiff's premises were polluted by several independent causes" (appellant's brief, p. 41) is not well taken.

B. With Respect to How Much Pollution Occurred Before and After April 1972 -- The Date of Release.

In this action, plaintiff claimed compensatory damages against the defendants for polluting its lakes. Cities Service interposed an affirmative defense of general release, as it was required to do if it desired to raise and litigate that issue as a defense (FRCP 8[c], 12). Burden of proof on this affirmative defense is a matter of substantive state law (2A Moore's Fed. Prac. §8.27[2], pp 1843-1850, and numerous cases cited).

Cities Service claimed that the release was a full and complete defense to all claims by asserting in its answer

> "AS AND FOR A SECOND DEFENSE THE PLAINTIFF, ON APRIL 27, 1972, EXECUTED AND DELIVERED TO THE DEFENDANT A GENERAL RELEASE FROM ALL LIABILITY ALLEGED IN THE COMPLAINT HEREIN (A24)".

Upon the trial, plaintiff showed that the defendant polluted its ponds continuously after April 1972 and until October 1973, which included a period of almost 9 months after the commencement of this very action. The pollution continued to cause damage to plaintiff's property until the time of trial. Plaintiff proved loss of income during the period of time after the release of April 1972 to the time of trial, except that, as indicated previously (p.30, supra), no claim for lost rents had been made for 1972. Plaintiff proved the cost of removing the oil saturated lake bottom (Pltfs. exh. 1 in evid.; E1).

On ample evidence, the jury found these damages to be in the sum of $60,000.

It had been the defendant's burden to show that the damages proven by the plaintiff, in whole or in part, had been released by virtue of the April 1972 release provisions of the state court stipulation of settlement (Boxberger v. New York, N.H. & H.R. Co., 237 NY 75 [1924]; 49 N.Y. Jur., Releases, §45). It came forth with no such proof and failed to carry its burden -- in whole or in part. The burden never shifted (8 Carmody Wait 2d §56:9). The jury was fully aware of the issue; it found in writing that the release date was April 1972 (A1378) and was carefully instructed that if it were to award compensatory damages, it must be only for the damages arising after the date of the appropriate release (A1280).

This was just another question of fact squarely and properly resolved by the jury in favor of the plaintiff. If anything, Cities Service received "the better of it" since the trial court framed the issue to the jury without advising it that the defendant, and not the plaintiff, had the burden of proof with respect thereto.[6] The jury, then, decided the issue on the basis of the general proposition

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[6] The trial court, in a colloquy, properly noted that the defendant had the burden of proof under its affirmative defense of release to show how much damage it caused during the periods before and after the release -- that the burden was not the plaintiff's.

> "it does not seem to me the burden shifts to the plaintiff to prove how much is before and how much after. It seems to me if anything the burden is on the wrongdoer to prove that only half of the damage is due to our oils after and half is before or whatever the percentage is that you may conclude is applicable to each period. I certainly don't think a wrongdoer can put on an injured plaintiff the burden of showing how much oil came before and how much came after in these circumstances, but it is a point. I have thought about it. In mulling it over I concluded that that is clearly the way I see it". (A846),

that "it must be persuaded that the plaintiff has proved its claim, proved its right to be compensated by a fair preponderance of the credible believable evidence . . . the plaintiff has what we call the burden of proof . . . [T]he plaintiff must satisfy you, the jury, that it has proved its contentions by a fair preponderance of the credible evidence (A1255).

The plaintiff so convinced the jury, even though it was the defendant's obligation to do so. Certainly the defendant was not aggrieved and cannot be heard to claim reversible error.

C. With Respect to the Contention of Error Because of "Plaintiff's Obligation . . . To Establish Whether Cost of Restoration Or Diminution in Value Would be the Lower Figure (appellant's brief, p. 44).

Defendant, citing Hartshorn v. Chaddock, supra, contends quite specifically that it was "plaintiff's obligation, under the rule of Hartshorn, to establish whether cost of restoration or diminutio- in value would be the lower figure (appellant's brief, p. 44). Cities Service also contends that it "made numerous objections to the proof regarding the cost of restoration" (appellant's brief, p. 44) and that upon these contentions, the issue of compensatory damages should not have been submitted to the jury.

However, on the issue of compensatory damages, it was established that (a) plaintiff paid $70,000 for the property in 1975 (A772); (b) that it made subsequent improvements thereon (for example, A607-A608); (c)that the cost of repairing the damage was $21,000 (pltfs. exh. 1 in evid.; E1) and that rentals were lost from 1973 through 1976, possibly as much as $45,000 (pltfs. exh. 82 for id; E100). On the basis of this proof, the jury awarded the plaintiff $60,000 for compensatory damages.

Appellant Cities Service's "beef" is that it "attempted to present proof of its own and examine Doralee's witnesses regarding the question of whether there was any diminution in value of the Doralee premises because of the alleged oil pollution" (appellant's brief, p. 44), but was not permitted to.

The manner of its presentation of this contention is characteristic of Cities Service's entire appellate approach in this case; not one of the numerous folio references made by it on page 44 of its brief supports any of the propositions for which the references were made.

PROPOSITIONS STATED BY CITIES SERVICE IN ITS BRIEF AT PAGE 44 AND RECORD REFERENCES IT ATTRIBUTES THERETO	WHAT THE RECORD SAYS AT FOLIOS CITED BY CITIES SERVICE
Cities Service made numerous objections to the proof regarding cost of restoration (A861, A862). <u>These folios showed nothing of the kind</u>.	These folios relate to defendant's motion to dismiss at end of plaintiff's case. The court stated that nobody disagreed with him "that the plaintiff's case consisted of a claim for the expenses of removing the bottom of the lake and substituting new earth, and for the loss of rental income on the cabins" (A862).
Cities Service...attempted to present proof...and examine Doralee's witness regarding...diminution in value of Doralee's premises, citing A867-A863. <u>These folios showed nothing of the kind</u>.	All that had occurred here is the court denied Cities Service's motion to dismiss the 8th cause of action; the court properly stated "nobody has given us any proof of what the land was worth before or what it is worth now"(A867).
and further citing A538-A542;	Plaintiff's expert answered all questions put to him without objection, except with respect (i) to the plaintiff's cost of acquisition of the property <u>which was later received</u> (A772) and (ii) to a patently improper question (A542) (Lines 3-6).
and further citing A569, A581;	At A569, the court properly sustained objection to two improper questions (lines 13, 18) (A582). All parties concluded examination of plaintiff's expert Edison.

PROPOSITIONS STATED BY CITIES SERVICE IN ITS BRIEF AT PAGE 44 AND RECORD REFERENCES IT ATTRIBUTES THERETO (CONTINUED)	WHAT THE RECORD SAYS AT FOLIOS CITED BY CITIES SERVICE (CONTINUED)
and further citing A725-A731;	In these six pages, one question was asked (A725). Later, however, at A772, the same question was asked of the same witness and an answer given without objection, the court having reversed itself (A770,A771). The court so advised the jury.
and further citing A822-A823; none of which folios are supportive of Cities Service's reference.	Plaintiff was re-examined with respect to how much she wanted for the sale of her property. Objection was sustained to this question. "Would it refresh your recollection if I stated a figure to you?" However, whether or not the objection was sustained, no offer or proof was made as to what the cross-examiner had in his mind. There is nothing to review even if this were a crucial question, which it wasn't (A822-A823).
Citing A750, Cities Service represents, out of context, that Judge Owen indicated...a problem "with Cities Service's counsels attempts to demonstrate...original purchase cost...[and]...no diminution in value of the property.	At the side bar, in the absence of the jury, the trial court merely denied Cities Service's motion for a mistrial. No one mentioned "diminution in value". The court then gave curative instructions to the jury although none were needed or required. There were no exceptions (A751).
Cities Service contends that MGO made "relevant objections" to Doralee's failure to prove its damages, citing A866;	The third party defendant, moving to dismiss the complaint, merely urged that the plaintiff's income had been higher in the last few years, and agreed that there had been no proof of diminution of value.
and further cited A906 for that proposition, <u>which folio shows nothing of the kind.</u>	The court <u>received</u> in evidence copies of plaintiff's leases with its tenants subject to further proof that the leases resulted in income to the plaintiff (A906).

It is an unfair burden on counsel to analyze these citations to demonstrate the "inaccuracy" thereof. But this analysis is necessary to demonstrate not only "inaccuracies", but the gross impropriety of the appellant's factual contentions. There is the same problem with appellant's citations of law. It attempts to apply Hartshorn v. Chaddock, supra, in its favor and in support of reversal, contending that the case says just with it doesn't say. Hartshorn, supra, supports affirmance of this case and holds, as is the case here:

> "The defendant could have proved the diminution in value of the lot either on cross-examination of the plaintiff's witnesses or upon his defense, but as he omitted to do this, or to raise any question except the admissibility of the testimony, he must be deemed to have waived the necessity of further and more complete proof on the part of the plaintiff. When, as in this case, damages are to be assessed upon one of two methods, according to circumstances, and the plaintiff's proof is by one of these methods only, and the defendant fails to supply the other mode of proof, which may be more favorable to him, or to raise any question as to the failure of the plaintiff to supply it at the trial, an appellate court ought not to reverse the judgment, especially in a case like this, where there is nothing to show, and no claim even made that the other theory of damages would be more favorable to the defendant." (Hartshorn v. Chaddock, supra, at 123)

The New York Court of Appeals, then, back in 1892 when Hartshorn was decided, predicted Rule 43 [c] of the Federal Rules of Civil Procedure,[6a] and subsequent federal case law -- for instance Fortunato v. Ford Motor Co., 464 F 2d 962 at 962 (2nd Cir. 1972), which are identically dispositive of Cities Service's contentions here. Very simply, just what was it that was excluded, which, if received, was to Cities Service's advantage or in contradiction

6a FRCP Rule 43[c] was superceded by Fed. Rules of Evid., Rule 103(a-2).

of plaintiff's proofs? Who knows? The answer cannot be found in this record. There was no offer of proof.

Consequently, plaintiff was not obliged to show "that the costs of restoring the premises did not exceed the diminution in value thereof", as the defendant erroneously contended (appellant's brief p. 45); furthermore, defendant was not precluded from introducing any of its proofs, if it had any, and there was no error.

The fact of the matter is that Cities Service was not precluded from proving anything -- but if, perchance, objections to certain of its questions had been improperly sustained, still, there was never an offer of proof, formal or informal, to substantiate an otherwise naked assertion of prejudicial error.

To sum it all up, Cities Service never asked the plaintiff, the plaintiff's real estate expert Edison, or its own real estate expert Rieber, or anyone else, what the present value of the premises was, and what it would be sans the oil pollution. It had every right to so inquire, but didn't. This court, of course, may not be called upon to speculate on what the answers would be to these unasked questions.

And, in any event, the court did indeed charge the jury, at Cities Service's request, as follows:

> The plaintiff may also recover the cost of repairs or restoration, in this case the dredging of the ponds or the difference between the value of the land before and after the harm, whichever is less. There is a conflict in the testimony in this area as to which you must resolve should you reach this issue (A1282).

The jury reached the issue and resolved the conflict.

D. With Respect to Cities Service's Contention that Damages Could Not Be Proven for the Period of Time Subsequent To the Commencement of Suit (appellant's brief, pp. 19,48):

Throughout its brief, appellant contends that damages should only have been awarded as of the time of the commencement of the action. This is not the case.

> "(W)here a nuisance to real property has been discontinued, the measure of relief is . . . regulated by the situation at the time the case is decided, and is not limited by the time of commencing the suit" (Gasse v. Development & F. Co., 135 NYS 732 [Sup.Ct. 1912]; 12 NY Jur., Damages, §58).

This rule rests upon the proposition that an injured party should not be required to bring more than one action or to institute proceedings before he is aware of the potential extent of his injury. (United States v. Dickinson, 331 U.S. 745, 67 S. Ct. 1382 [1947]). In other words, when plaintiff has an opportunity to prove all his damages at one time, he should be permitted to do so. This is not the case when the nuisance or trespass continues as of the time of the trial. Here, the parties agreed that in October of 1973, the pollution had been abated. Plaintiff merely contended that the damages flowing from such pollution continued to the time of trial. The jury's verdict compensated the plaintiff for all damages.

E. With Respect to Cities Service's Contention that Proof of Pollution Prior to April 25, 1972 Should not Have Been Admitted:

Cities Service contends throughout its brief that proof was received concerning an oil emission prior to the date of the April 25, 1972 release (see, for instance, appellant's brief, p. 17, where appellant erroneously "alleged that 'all of plaintiff's proof, except for the testimony of Robert Rosch', related to observations prior to April 25, 1972". This is just no so. Messrs. Hudson and Kwak of the New York State Deparment of Environmental Conservation testified with respect to reports dated after April 25, 1972, concerning oil spills both before and after that date (Pltf's exh. 2 in ev., Water Pollution Case Report dated 12/18/72 [E3]; Pltf's exh. 28 in ev, N.Y.S. Dept. of Environmental Conservation's "Fish Kill Report dated 9/8/72 [E73]; Pltf's exh. 2 [at E5] refers to the fish kill report, which was part thereof. In any event, right smack on the first page of the Water Pollution Case Report (E3) there appears the following: Dates of Inspection -- 3/21/72, 4/13/72, 4/20/72, 9/19/72, 12/12/72. As indicated in the counter-statement of facts, there was direct testimony by Dora Huss and William Edison as to the presence of oil on plaintiff's lakes as late as 1976).

In any event, Cities Service's counsel cross-examined with respect to these documents, attempting to show that under no circumstances did oil pollution cause the death of any fish. Cities Service treated these exhibits as its own. And, finally,

it was squarely an issue in the case as to what pollution, if any, occurred before April 25, 1972, and what pollution occurred thereafter (A1277, A1280). In the Counter-Statement of Facts, supra, it is fully documented that Cities Service's trial counsel developed new subject matter himself with respect to events, pollution and fish kills prior to April 1972 (testimony of Theodore Hudson, supra, pp. 7,8)

3. CITIES SERVICE NEVER INVOKED THE TRIAL COURT'S DISCRETION IN MOVING PURSUANT TO RULE 59b FOR A NEW TRIAL. ACCORDINGLY, THIS COURT MAY NOT BE ASKED TO REVIEW THE WEIGHT OF THE EVIDENCE.

There is not an American appellate court, state, federal or otherwise, which has at one time or another referred to the "always peculiarly sensitive position of the trial court who observed the witnesses and considered the evidence in the context of a living trial" to pass upon a motion for a new trial. Here, Cities Service did not invoke the trial court's discretion in seeking a new trial and it cannot now ask this reviewing court to do the trial court's job.[7]

After the jury's verdict, Cities Service orally moved as follows:

> "Your Honor, we move to set aside the verdict both as to compensatory and punitive damages and for judgment NOV.
>
> THE COURT: Let's stick with the compensatory for a moment.
>
> What is the basis of the motion for the compensatory?
>
> MR. COLIN: The basis is that it is contrary to the law and the evidence.
>
> I assume your Honor doesn't want me to go into that --
>
> THE COURT: Unless you have something specific to urge upon me I don't.

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[7] Appellee, of course, does not question the power of the court of appeals to grant a new trial upon a finding of "plain error". This point is directed to the otherwise available discretionary grounds for a new trial -- weight of evidence, etc.

Do you have something specific in the way of life of the trial judge? By giving it to the jury I obviously made the determination that there is evidence to support what they find, what is open to them to find. They did find in my judgment within that evidence. If you want to urge upon me something-- (emph. supp.)

MR. COLIN: I don't want to urge anything in addition to what I have already presented to your Honor in the course of the trial.

I believe on the law it should not have been given to them, and I don't want to repeat in effect what I have already presented for your Honor's consideration. (emph. supp.)

THE COURT: I will deny the motion to set aside the verdict and for a new trial or whatever.

MR. COLIN: Or Judgment NOV?

THE COURT: Yes, as to the jury's findings with regard to liability for compensatory damage and the amount of such compensatory damage.

MR. COLIN: I make the same motion with respect to the punitive damages.

THE COURT: There I will entertain that motion to the extent you want to give me authorities that bear upon it.

MR. COLIN: At this time?

THE COURT: I will give you time to do that on paper.

MR. COLIN: How much time?

THE COURT: I am not doing any more than giving you the right to move against it on the record so that I can consider it and your adversary would have the ability to respond. If you wish to make a motion before me on paper so you can argue the punitive damage amount, which is what I think is the only thing that would be open to question at this time, we will consider that fact.

MR. COLIN: My motion was not directed to excessiveness but rather to the finding in toto. I do think that both awards are excessive.

> THE COURT: I would deny the motion to the extent that the jury could not find it on this record because on this record I think the jury could find punitive damages. Whether or not the amount of damages the jury determined is appropriate on the entire record, I would be willing to consider that on a properly submitted motion and I give you leave to submit, if you desire.
>
> MR. COLIN: That would be without prejudice to our contention that punitive damages should not---
>
> THE COURT: Without any question. (A1323-A1325)

And, a few days later, without supporting factual references, and without a memorandum of law, Cities Service filed a perfunctory motion, seeking only to reduce the award of punitive damages (A1357-A1359). The motion was denied, Judge Owen finding as follows:

> "Although leave was granted to Cities Service to brief the question of excessiveness of the jury's award of punitive damages, no precedents are called to my attention which suggest its excessiveness, and having in mind the record upon which the jury based its award, I cannot conclude, as a matter of law, that it was excessive. The motion to reduce is denied". (A1360)

The award of punitive damages and the amount of the award were fully justified. (Point 4 , infra, pp. 46-54).

And, the award of compensatory damages and the amount of the award were fully justified also (Point 2 , infra, pp. 29-41). The trial court specifically denied Cities Service's oral motion "to set aside the verdict and for a new trial...as to the jury's findings with regard to liability for compensatory damages and the amount of such compensatory damages (A1324). At the time,

obviously, the evidence and the entire posture and context of the case were clearly fixed in the mind of the trial court.

The two post-trial rulings by the trial court -- one oral (A1324) and one in writing (A1360)-- effectively denied a new trial on all grounds. There was no abuse of discretion with respect to these rulings.

Furthermore, since Cities Service omitted to move for a new trial pursuant to Rule 59b, there is really nothing to be reviewed here.

Professor Moore, recognizing that a motion for a new trial concerns an exercise by the trial court of its discretion, says

> "...the only review available in the appellate court of a ruling on a motion for a new trial is limited to determining whether it abused its discretion. But naturally in order to invoke even this narrow review...a motion for a new trial would have to be made if a party desired to attack a judgment in a jury case on the ground the verdict is against the weight of the evidence..." (6A Moore's Fed. Prac. §59.15[1]) [8]

In any event, the plaintiff's carefully documented counter-statement of the facts, the documentary evidence, the evidence alluded to in the legal arguments in this brief, and the record as a whole, show an overwhelming case for liability and damages.

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[8] See, by way of analogy, Vaught v. Childs, 277 F 2d 516[2nd Cir. 1960] at 518, where the Second Circuit held that as a matter of law it could not review the jury's award of damages since "no motion for a new trial or to set aside the verdict on the ground of excessiveness was made".

4. THE ISSUE OF PUNITIVE DAMAGES WAS FAIRLY SUBMITTED TO THE JURY UPON A PROPER CHARGE AND AMPLE PROOF. THE TRIAL COURT CORRECTLY REFUSED TO DISTURB THE JURY'S FINDINGS AS TO BOTH THE AWARD OF PUNITIVE DAMAGES AND AS TO THE AMOUNT THEREOF.

Cities Service's dual contentions -- that (a) the issue of "punitive damages" should not have been submitted to the jury, and that (b) even if properly submitted, the jury's award was excessive -- are without merit. Its arguments are predicated upon its own inaccurate statement of the facts in this case, and upon misinterpretation of the law of punitive damages.

A. As to the Defendant's Contentions That There was no Cities Service Managerial or Corporate Involvement of Ratification in Polluting Plaintiff's Land, and That the Court's Charge With Respect to This Issue was Erroneous:

Cities Service takes the position that the court erred in denying its request to charge relating to corporate liability for punitive damages (A1356). Its request, besides being untimely (A1162) was wrong -- it would have required "that the officers and directors constituting the management of the defendant authorized... or ratified the conduct...". This is not the law. The trial court, relying on Judge Croake's charge in Roginsky v. Richardson, Merrel, Inc., 378 F 2d 832 at 842 (2nd Cir. 1967) and cases cited, properly charged as follows:

> "You may not impose punitive damages on a corporation, however, unless a responsible management official or officials of the company, or the relevant division, either authorized, participated in, consented to, or after discovery ratified the conduct giving rise to such damages' (A1285).

Cities Service's management involvement in the continuous pollution of plaintiff's property is proven throughout the record. For instance, management involvement is acknowledged in a Cities Service inter-company memorandum (E22, Pltf's. exh. 5 in ev).[9] This document was dated January 26, 1973, after Cities Service entered into the state court agreement of April 1972, and prior to the commencement of this action in February 1973. No less than five "people in Cities Service with some type of authority" and members of Cities Service's general office signed and approved that document (A462). Cities Service's own trial counsel, who contends in its brief before this court that there was no management participation, knowledge or ratification of Cities Service's conduct in polluting the lands of the plaintiff, himself acknowledged on the record the authority of those who executed that document to do so (A463).

General counsel for Cities Service, Russell H. Smith, of its home office in Tulsa, Oklahoma, participated in, and authorized the April 1972 state court settlement (E115, Deft's. exh. K in ev). Smith was in charge of the within action from its inception, and was

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[9] The inter-company memo, dated January 26, 1973, stated:

"...we are now under court order to either install an oil water separator or cease operations. The cost of a separator is estimated at $46,000..."

"Since we are being exposed to further damage claims by continued operation of this facility and since substantial expenditures would be required to remove the tanks and replace the saturated soil, we propose to sell all land and improvements to our distributor, Monticello Gas & Oil, for the sum of $1.00 along with written indemnification from further liability" (E22).

aware of the continued pollution (E30, pltf's exh. 7 in ev). At least one dozen written documents, signed by and addressed to at least nine different Cities Service personnel, each obviously engaged in management, clearly indicate corporate management's participation, knowledge, and ratification of Cities Service conduct in polluting plaintiff's property (E20, E22, E26, E30, E33, E39, E40, E41, E42, E43, E44, E49).[9A]

These letters and memoranda were between Cities Service's main office in Tulsa, regional office in Englewood Cliffs, New Jersey, and regional office in Braintree, Massachusetts.

Obviously, it was Cities Service's willful business decision to delay cessation of the pollution for monetary consideration only, and the plaintiff be damned. This, of course, is a basis for punitive damages.

B. As to Cities Service's Contentions That Punitive Damages are Inappropriate in Cases of Simple Negligence and Simple Breach of Contract:

Cities Service further contends that "...neither simple negligence nor simple breach of contract serve as a basis for punitive damages" (appellant's brief, p. 52). However, in this case there was no mere simple negligence, nor was there a mere simple breach of contract.

No "Simple Negligence"

The court thoroughly and properly instructed the jury upon ample supporting evidence, that if the defendant's

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[9A] In Williams v. City of New York, 508 F 2d 356 at 361 (2nd Cir. 1974), this court held that to collect punitive damages against a corporation ---a municipal corporation in that case---the plaintiff "must show that those persons in a position of authority in the [appropriate] department in some way authorized, ratified, or fostered the acts complained of".

negligence was wanton, reckless, coupled with an awareness of a substantial and unjustifiable risk to the rights of others, punitive damages may be, but need not be awarded (A1285-6, A1283).

No "Simple Breach of Contract"

The agreement intentionally violated here was a consensual mandatory injunction to be supervised by the state court (E118-E120).[10] Continued pollution thereafter constituted grounds for an award of punitive damages (Gorham v. New Haven, 79 Conn. 670, 66 A 505 [1907]; Klassen v. Central Kansas Co-op, 160 Kan. 697, 165 P 2d 601 [1946]; Pettengill v. Turo, 159 Me. 350, 193 A 2d 367 [1963]; Southland Co. v. Aaron, 224 Miss. 780, 80 So. 2d 823 [1955]).

The rule relied on by Cities Service applied to arm's length business agreements -- not to the "agreement" in this case which Cities Service properly recognized as a "...court order to either install an oil water separator or cease operations" (Pltf's exh. 5 in ev., E22).

Finally, the court properly charged that an intentional violation of the state's pollution laws might be considered by

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[10] The mandatory injunction, agreed to in April, 1972, provided (a)"..the defendants shall submit to the court plans and specifications for the installation of a system which will be designed to eliminate the discharge...of any petroleum products from the defendant's premises onto the lands or lakes of the plaintiff..." and (b)..within 60 days thereafter, the defendants undertake...to commence work...called for..., which work shall be carried out in an expeditious fashion , and (c) that the "...Court shall retain jurisdiction of this action with respect to the cause of action for a permanent injunction...". However, the pollution continued -- intensified -- thereafter until August 1973. In April 1973, the N.Y. Department of Environmental Conservation had issued a pollution citation (E20, E49).

the jury in determining whether or not punitive damages were appropriate. This is classically correct since:

> "the possibility of an award of such damages may not infrequently induce the victim, otherwise unwilling to proceed because of the attendant trouble and expense, to take action against the wrongdoer. Indeed, such self-interest of the plaintiff has been characterized as 'Perhaps the principal advantage' of sanctioning punitive damages because it 'leads to the actual prosecution of the claim for punitive damages, where the same motive would often lead him to refrain from the trouble incident to appearing against the wrongdoer in criminal proceedings" (McCormick, Damages [1935], pp. 276-277; Walker v. Sheldon, 10 NY 2d 401 [1961]).

C. The Amount of Punitive Damages was Peculiarly for the Jury and the Trial Court did not Abuse its Discretion in Determining it to be, on the Record, not Excessive:

Only after the jury found that punitive damages were to be awarded during its initial deliberation, the jury was advised as a matter of evidence "that as of December 31, 1975, the net worth of Cities Service Oil Company is $1,336,035,000.". Following additional summations with respect to the issue of the amount of punitive damages, the jury was charged solely with respect to that issue (A1136). The jury awarded $200,000 for punitive damages (A1321).

Cities Service claims that reading its net worth to the jury was reversible error (appellant's brief, p. 55). But New York law squarely holds that the defendant's wealth is admissible on the amount of punitive damages (Rupert v. Sellers, 48 AD 2d 265, 269-272, 368 NYS 2d 904 [App. Div. 1975]). The Fifth Circuit, applying New York law, recently cited Rupert v. Sellers,

supra, in support of this proposition in Fury Import Inc. v. Shakespeare Co., 554 F 2d 1376 at 1389 (5th Cir. 1977).

In the case at bar, Judge Owen procedurally followed Rupert v. Sellers, supra, so that the jury did not have before it evidence of the defendant's net worth until after it decided that punitive damages were to be awarded.

Cities Service urges a new rule of law, conceding it to be without precedent, to the effect that a stipulation tendered by it that it was able to respond to any judgment which might be awarded by the jury, made it reversible error to permit the jury to know Cities Service's actual net worth. This is illogical when considered in the light of the purpose of permitting the jury to consider the defendant's wealth in fixing punitive damages. Rupert v. Sellers, supra, states the New York rule, which is the rule of the majority of state jurisdictions, that in fixing punitive damages:

> "the wealth of a defendant becomes material, since what would amount to punishment visited upon a poor man would be a mere trifle to a man of wealth".

As Judge Weinfeld pointed out in Reynolds v. Pegler, 123 F Supp. 36 at 41-42 (SDNY 1954), aff'd 223 F 2d 429 (2nd Cir. 1955), unless punitive damages were to be "of sufficient substance to 'smart' the offender in effect purchases a right... "to wrong another "...for a price which may have little or no effect upon him. Indeed, in such a situation a defendant, instead of being deterred from a repetition of his offense, may be encouraged to renew his assault".

Here, Judge Owen correctly charged:

> "In fixing punitive damages you may consider the defendant's financial condition since damages which would be exemplary when inflicted upon a person of moderate circumstances would be trivial and in no practical sense exemplary when imposed upon a person whose property and income is very much larger. You are entitled, therefore, to consider the evidence of the net worth of the defendant in concluding what damages are punitive in all the circumstances of this case.
>
> Keep in mind that we are dealing here with the oil spillage and defendant's conduct as revealed on this record, in this case, and you may not go beyond that in your consideration.
>
> I caution you that while obviously the net worth of Cities Service is great, that alone is not a license or an invitation to you to make an unwarranted award". (A1320).

And, the trial judge held, in denying defendant's motion to reduce the award, that:

> "having in mind the record upon which the jury based its award I cannot conclude, as a matter of law, that it was excessive" (A1360).

The jury was instructed to make its award "on this record in this case" (A1320). It did, and the trial court found that it did. The award was for an almost infinitesimal .00015 of Cities Service's net worth.[11] There is no showing of any kind

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[11] In Herman v. Hess Oil, 379 F. Supp. 1268 (DC V.I. 1974) at 1276-1277, affd. 524 F 2d 676 (3rd Cir. 1975), the district court reduced a punitive damages award against Chicago Bridge & Iron Company from $5,000,000 to $1,000,000. The trial court, affirmed by the Third Circuit, stated that since Chicago Bridge & Iron's net worth was $3.5 million, and considering the goals of punishment and deterrence, an award of $1,000,000 of punitive damages would be appropriate. The punitive damages award in that case, as reduced and affirmed, was 30% of the defendant's net worth. In the case at bar, the jury awarded punitive damages of $200,000 where the defendant's net worth was $1.336 billion, a mere .00015 of the defendant's net worth.

by Cities Service of any abuse of discretion. The amount of punitive damages is peculiarly a matter for the jury and for the trial court (Stevenson v. Hearst Consol. Publications, 214 F 2d 902, [2nd Cir. 1963], cert den 348 US 874, 75 S. Ct. 110 [1954]).

It is interesting that in the defendant's perfunctory post-trial motion to reduce the award of punitive damages (A1357) it contended that "the award of punitive damages is greatly in excess of the penalty imposed by the New York statute for the offense with which Cities Service Oil Company was found chargeable". This is not so. New York State Environmental Conservation Law §71-1933 provides, upon conviction of a violation of the subject provision of the Environmental Conservation law, for

> "A fine of not less than $500.00 nor more than $2,500.00 ... each day upon which such violation occurs shall constitute a separate violation" (emph. supp.).

The violations here continued on day by day for a period in excess of a year, at least. The maximum state penalty for a mere 80 days' violation would be $200,000. And, on its own admissions in this record, Cities Service was solely in possession and control of the bulk oil plant in excess of 80 days. While it was busy polluting plaintiff's lakes, Cities Service was actually aware of the prospective fine, as indicated in an inter-company memo reporting an Environmental Conservation complaint hearing:

> "...if Citgo was represented the fine would have been much more. In fact the law provides up to $2,500 per day" (Pltf's. exh. 4 in ev., E20).

Thus, it was Cities Service cold business calculation to risk the fine and to continue the polluting. Under what circumstances would punitive damages be more appropriate?

Money was Cities Service's sole concern with respect to this pollution problem. In all of the numerous documents received in evidence, not once did it indicate any concern for the plaintiffs -- only for its own pocketbook -- was it better to spend $46,000 for an oil separator and continue operation, or to abandon the plant at a financial loss and to spend $7,500 to clear up the mess? (Pltf's exh. 5 in ev., E22).

The award in this case per the court's instructions was to be predicated on the facts in this record and to deter Cities Service and others from continued or future similar acts (A1320). Anything less than $200,000, the jury felt, would constitute a green light for Cities Service to continue to violate the integrity of its neighbors' property.[12] Certainly, that amount is not monstrous, shocking or unconscionable.

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[12] Cities Service admits ownership of other oil storage depots (A23-A24).

5. THE JURY WAS IMPANELLED PROPERLY. CITIES SERVICE'S COMPLAINT THAT IT WAS DEPRIVED OF THREE ADDITIONAL PEREMPTORY CHALLENGES IS SPECIOUS SINCE THE RECORD INDICATES THAT IT WOULD HAVE EXERCISED ONLY ONE MORE PEREMPTORY CHALLENGE . . . BUT CITIES SERVICE WAIVED ONE OF ITS CHALLENGES. THIS NEGATES PREJUDICE AS A MATTER OF LAW. (Connecticut Mutual Life Ins. Co. v. Hillmon, 188 U.S. 208 at 211-212, 23 S. Ct. 294 at 295 [1903]).

Cities Service contends that it was deprived of so-called "statutory rights" to additional peremptory challenges during the selection of the jury (appellant's brief, Point V, pp 56-59), and is thereby entitled to a new trial. However, the record is crystal clear as to two all-important facts which occurred during the voir dire, which facts render such contention meaningless.

Fact #1. Cities Service represented to the trial court that had additional peremptory challenges been available to it, it would have exercized but one such peremptory challenge (A163), and

Fact #2. Cities Service expressly waived one peremptory challenge (A145, A163).[13]

Thus, the plaintiff was not prejudiced, and its claim to the contrary is without factual or legal basis (Connecticut Mutual Life Ins. Co. v Hillmon, supra; Standard Industries Inc. v. Mobil Oil Corp., 475 F2d 220 at 225 [10th Cir. 1973]; Matanuska Valley

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[13] Cities Service contention that it did not waive one of its challenges is ludicrous and contradictory to the record:
"THE CLERK: The defendant Cities Service waives its challenge"(A145).
and
"MR. COLIN": Your Honor, I would want to exercize a peremptory challenge as against Juror No. 2, and I am informed by your Honor and the clerk that I no longer have it. I would like to note, for the record, my exception to that ruling, sir."
"THE COURT": It is not a ruling, it is a fact (A163)."

Lines v. Neal, 255 F2d 632 at 635 [9th Cir. 1957]).

Cities Service, relying on John Long Trucking Inc. v. Greear, 421 F2d 125 (10th Cir. 1970), quite mistakenly contends that it suffered reversible error because the trial court did not permit it three separate peremptory challenges. However, in the John Long Trucking case, the court did not exercise any discretion conferred upon it in 28 U.S.C.A. §1870[14], erroneously stating ". . . that in cases involving multiple plaintiffs or defendants, only three peremptory challenges to the side were permissible under 'settled law'. . ." (John Long Trucking Inc. v. Greear, supra at 127-128). The Tenth Circuit held that the trial court's failure (a) to recognize the fact that it did have discretion, and (b) to exercize such discretion, under the facts in that case,[15] constituted error. And, the Tenth Circuit, subsequently, in Standard Industries Inc. v. Mobil Oil Corp., supra, cited the

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14 §1870. Challenges.

In civil cases, each party shall be entitled to three peremptory challenges. Several dafendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercized separately or jointly.

All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court. June 25, 1948, c. 646, 62 Stat. 953; Sept. 16, 1959, Pub. L. 86-282, 73 Stat. 565.

15 John Long Trucking Inc. v. Greear, supra, involved a multiple vehicle accident, where the defendants owned and operated separate vehicles and, by way of cross claims, asserted independent claims against each other for personal injuries and property damage. In the case at bar, Cities Service's claim against the third party defendant is solely upon a written indemnification agreement.

John Long Trucking case for the proposition that in a multiple defendant situation, when requested to do so, the court must exercize discretion with respect to allowance or disallowance of additional peremptory challenges.

In the case at bar, Judge Owen specifically recognized his statutory discretion (A103) and exercized it by allowing Cities Service and MGO three joint peremptory challenges, plus two additional ones -- one separate peremptory challenge for each of them, making five in all (A103-104). Of course, "the manner in which peremptory challenges are to be exercized is committed to the sound discretion of the trial court" (Gafford v. Star Fish & Oyster Co., 475 F2d 767 [5th Cir. 1973]).

The trial court might very well have declined to allow Cities Service and MGO the two additional peremptory challenges granted to them without abusing its discretion (Carey v. Lykes Bros. Steamship Lines v. Ryan Stevedore Co., 455 F2d 1192 at 1194 [5th Cir. 1972]; Moore v. South African Marine Corp. v. Gulf Stevedore Corp.; 469 F2d 280 at 281 [5th Cir. 1972]). This is especially so since Cities Service's trial posture in this case presented no inimical jury position to that of MGO. In its third party complaint, Cities Service claimed that by virtue of a written indemnification agreement, it was entitled to "judgment over" or indemnity from MGO (A10-A21, A1088). And, upon trial, the only proposed request to charge submitted by Cities Service to the court was for a directed verdict in its behalf against MGO (A101). Cities Service never contemplated or suggested that the

jury would have to pass on any issue of fact between it and MGO.

Defendant appellant Cities Service shows no legal, equitable, or factual basis for its claim that it was prejudiced during the selection of the jury; to the contrary, the court exercized its 28 U.S.C.A. 1870 discretion in a generous manner, keeping in mind that such statute provides for peremptory challenges predicated upon a twelve juror panel -- and not a six juror panel as was selected here.

6. CITIES SERVICE'S CLAIM OF NUMEROUS ERRORS IN TRIAL RULINGS AND PREJUDICE IS WITHOUT LEGAL OR FACTUAL SUPPORT IN THE RECORD.

A. Claims of Suprise and Prejudice in Permitting Pleadings To Be Conformed To Proof Are Ridiculous; Plaintiff Had In Fact Abandoned a Cause of Action; There Was No Additional Unexpected Proof; And, Cities Service Had Sought and Was Granted Similar Relief Itself.

Cities Service claims surprise and prejudice (appellant's brief, p. 61-62) because the court permitted the plaintiff to prove the precise facts pleaded by it in its eighth cause of action as a basis for damages for breach of the state court stipulation, rather than as a basis for recission thereof. The eighth cause of action, as originally pleaded, alleged:

a) "that . . . on April 25, 1972, the plaintiff (and) defendant . . . entered into an agreement . . . "

b) "that said agreement was entered into (in) . . . an action then pending in the state court . . ."

c) "that defendant Cities Service has in all respects broken . . . the aforesaid agreement".

d) "that plaintiff has done all that was required by it to be done by virtue of the terms thereof" (All).

These factual allegations were fully and fairly tried by all of the parties. Cities Service's claim of surprise and prejudice is frivolous since the damages flowing from a breach of that agreement were precisely the same as the damages flowing from the causes of action for nuisance, trespass and wanton negligence. No new proof was required by any party. In plaintiff's opening statement, at the earliest possible moment in the trial, it was claimed that "they (Cities Service) dumped more and more oil in spite of a

court judgment that was made in the Supreme Court on their consent that they would cut it out" (A176).

Cities Service claimed it had complied with the state court settlement in its opening statement (A186). And during the trial, Cities Service's trial counsel said "that's correct", approving a statement "that recission has not even been pleaded in the case" (A648). Obviously, counsel then believed fully that plaintiff's claim was for damages -- not for recission.

In any event, the trial court granted the plaintiff's motion "to conform the pleadings to the proof so that the complaint jibes with the questions answered by the jury (A1326-27) (FRCP 15[b]),[16] one of which was whether or not Cities Service breached the state court settlement judgment. The ruling was fully appropriate (FRCP 54[c]). And, Judge Owen observed, even before plaintiff rested, and before the defendant commenced its case, that

> ". . . perhaps the complaint here is inartistic, but . . . it certainly is open to a motion to amend to conform with the proof we have taken, . . . we have litigated this 5 days of court time. . . I will certainly permit it to be amended to cover the proof" (A854).

Finally, Cities Service's claim of surprise and prejudice is raised for the first time here. They did not so complain at the trial -- certainly not at folios A648-A649 cited by it in its brief (appellant's brief, p. 60). The claims of surprise and prejudice are afterthoughts. There was never request for a continuance -- there was no reason for one -- there was no new

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[16] Since this case was tried without a pre-trial order, no Rule 16 relief was required.

or additional proof required. End the matter.

(Northern Oil Co. v. Socony Mobil Oil Co., 347 F2d 81 at 83-84 [2nd Cir. 1965];
D.C. Jackson v. Atlantic Coast RR, 317 F2d 95 (4th Cir. 1963), a strikingly similar case, both factually and procedurally;
3 Moore's Fed. Prac. §15.13 (2), at 991-994 (2nd Ed. 1974).

B. The Court Permitted A Full And Fair Factual Trial Of All Contentions Of All Of The Parties Relating To "What Was Released And When" In the 1972 State Court Proceedings.

Cities Service contends throughout is brief, as though it were established in fact and at law that the plaintiff released it from all liability after October 24, 1972 (appellant's brief pp 6., 7, 14, 17, 18, 41, 48, 61-62). This was just not so.

The jury found otherwise, and, even if it hadn't, this court undoubtedly would have ruled, as a matter of law, that April 25, 1972, (and not October 24, 1972), was the effective date of the release.

Very simply, on April 25, 1972, during the course of an earlier state trial between the same parties to this action involving oil pollution prior to that time, a stipulation of settlement was entered in open court before DeForrest C. Pitt, Justice of the Supreme Court (A14-A17), which was tantamount to a consent mandatory injunction.

The relevant part of the stipulation stated:

> ". . . payment of $12,500 by the defendants to the plaintiff settles and compromises and extinguishes any and all claims that the plaintiff has or might have or will have against these defendants for the alleged nuisance and negligence from the date of purchase of these premises by the plaintiff to the present date, April 25, 1972 (emph. supp., A15).

Plaintiff Doralee Estates Inc., by its president, Dora Huss,

executed a document a day or two later, which stated:

> "This release is delivered pursuant to a stipulation of settlement of pending action in the Supreme Court, Sullivan County, State of New York, entitled DORALEE ESTATES, INC., Plaintiff, versus MONTICELLO GAS & OIL CO., INC. and CITIES SERVICE OIL COMPANY, Defendants, copy of which stipulation is annexed hereto. This release is specifically limited to all claims in such action for damages for the period commencing with the ownership of the premises involved in such lawsuit by DORALEE ESTATES, INC. in 1965 and extends to all claims for damages from that day to and including the 24th day of October, 1972, as specifically set forth in said stipulation and as conditioned therein." (all emph. supp., def. exh. P, E116).

After lengthy development of the circumstances concerning the stipulation in open court of April 25, 1972 and the execution of the subsequent document of April 27, 1972 (A643-A651, A660-A665, A678-A683, and particularly A835-A836; def. exh. P, E116) the court instructed the jury that it was to determine whether that document (def. exh. P, E116) "was intended to release Cities Service for a further period of time [after April 25, 1972], that is, up to and including October 24" (A1264-65). The verdict form submitted to the jury included the following finding which was self-explanatory:

> "The date to which the parties intended the settlement agreement release to run
>
> April 24, 1972 ___X___ (check one)
>
> October 24, 1972 _____
>
> (A1338)

It could be no other way. The document signed by Doralee on April 27 was "delivered pursuant to a stipulation of settlement" (but the stipulation never mentioned the requirement for any

subsequent document -- the stipulation was complete and self-executing). Its terms were intended to be "as specifically set forth in said stipulation and as conditioned therein" (def. exh. P, E116). And of course, the stipulation of settlement released the defendants from liability "from the date of purchase of these premises . . . to the present date, April 25, 1972" (A15) .

Defendant's trial counsel never contended that there was consideration for the April 27 document; there was none (A646-A647).[17] Each of the parties, on the other hand, had been asked by the court if they understood and approved the stipulation in open court -- each did (A17, A650, A652). There was no other understanding. The unilateral, superfluous,unnecessary document signed two days later was not bargained for -- and was without consideration. It was a unilateral mistake -- clerical (A665). The stipulation of settlement in open court, on the other hand, was complete, cogent- and unambiguous. The law is clear.

> "where a release is given without consideration, a unilateral mistake on the part of the one giving the release may be sufficient to vitiate it" (Buffalo Electric Co. v. State of New York, 9 AD 2d 372 at 374 [Appl. Div. 1959]; Matter of Kelleher, 19 AD 2d 147 at 150 [App. Div. 1973]; Restatement, Restitution, § § 26, 49; 5 Williston Contracts [rev. ed.], §1574, p. 4402; 58 Mich. L. Rev. 90).

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17 In a deposition of Robert C. Beck,Cities Service's Regional Facility Manager, taken at the office of Baer and Marks, Cities Service's counsel on June 25, 1974 (concededly not having been read to the jury), George Colin, Cities Service's trial counsel and appellate counsel stated ". . . the present suit involves matters subsequent to April 25, 1972. All matters prior thereto were encompassed and released in the prior litigation . . ." (p. 5). ". . . we have a release of all claims up to April 25, 1972 . . ."(p. 7).

In an affidavit in this record, Mr. Colin swore "that the instant action can afford recovery only for acts and damages between April 25, 1972 and the commencement of this action . . ." (A36). He stated that ". .. all of the facts which might possibly constitute the basis of a claim . . .must have occurred between April 25, 1972 and May 1973" (A37).

C. Claim of Prejudice by Way of Non-Record "Substantial Publicity", Before and During The Trial, Relating to Oil Pollution Resulting From Accidents to Oil Tankers" (appellant's brief, p. 69) Was Never Raised At The Trial.

Cities Service never suggested to the court (a) that it objected to the trial being conducted at the time it was conducted; (b) that it requested any further charge or direction to the jury with respect to publicity of other oil spills;[18] (c) that it excepted to any portion of the charge relating to this matter; nor does the record indicate anyplace that such publicity did in fact occur, nor does the record indicate that if such publicity did occur, that the jury was aware of it. Finally, even if the record did indicate such publicity, even if the jury had been aware of it, there is no reason to believe that the jury's verdict was effected thereby. The verdict was, pursuant to the charge, "based solely on the evidence and the court's instructions as to the law" (A1289). Cities Service never invoked the trial court's discretion in moving for a new trial on these grounds. The point is without merit.

D. Contentions That the Trial Court Erred In Efficient Management of Judicial Time By Having Defendant Make Its Closing Argument in the Afternoon, And The Plaintiff's Closing Argument the Following Day, is Preposterous.

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[18] After the jury decided that an award of punitive damages per se was appropriate, the jury was instructed with respect to the law concerning the amount of the award. Cities Servie's counsel made a request to charge relating to other oil spills (A1317). . The court's charge in response thereto was satisfactory to Cities Service (A1145).

This was a nine day trial, and the appointment of time schedules was solely within the discretion of the trial court, and appellant's claim of prejudice is devoid of any merit (appellant's brief, pp 68-69).

E. Contentions (appellant's brief, pp 64-66) That The Court Erred in Admission of Damages Testimony Because of Hearsay, That The Court Castigated Defendant's Counsel Upon a Proper Objection, and That It Excluded Cities Service's "Argument Exhibit" (E148) From Evidence Are All Frivolous.

(i). Plaintiff's real estate expert testified that plaintiff's rents were "much less" than those obtained at comparable facilities in the immediate area (A508-A511). Of course, as any real estate expert always does, Edison did -- he relied to some extent upon information supplied to him by others. This was fully permissible, especially with respect to expert opinion testimony concerning real property, under Rule 703 of the Federal Rules of Evidence.[19] (3 Weinstein's Evid., U.S. Rules §703 [02], p 703-12, and numerous cases at footnote 24 therein. This was permissible even prior to the enactment of the Federal Rules of Evidence, see, for instance, Bailey v. United States, 325 F2d 571, 572-573 [1st Cir. 1963]).

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[19] RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Edison was fully qualified. The trial court found

> "that this man has been in the real estate there for 11 years. He supervises 17 salesmen. He has for sometime. He has participated some 50 times a year in Surrogate Court appraisal matters in the county . . ." (A509).

The trial court advised the defendants of their right to ". . . cross examine fully in any manner you feel is appropriate" (A509-A510). This was in accord with the spirit, letter and intent of Rule 705[20] of the Federal Rules of Evidence. And cross-examine the defendants did -- for 62 pages (A513-A575).

The defendants were granted three days to check the accuracy of the hearsay hypotheses relied upon by Edison (A702). The court pointed out that Cities Service counsel "Mr. Colin inquired as to all of the names of all of the various colonies and where they are located so he will be checking into that" (A702). No further time or further continuance was requested by Cities Service. Upon resumption of the trial, it had in the meantime retained its own expert to make his own investigation and to attempt to rebut Edison (A927-A986). The trial court properly ruled, without exception, that

> "there is adequate opportunity for any investigation that the parties may wish to make to produce the counter-vailing proof. If such exists, I will receive that proof on Tuesday, if the parties wish to adduce it (A702)".

There was no error in admitting Edison's expert testimony.

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[20] RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION.

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or date, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

(ii.) The court never "castigated" Mr. Colin, but addressed him at the side bar (A504-A506), and advised him that although a certain objection was theoretically a proper one, the question could be answered subject to connection. It was a proper ruling, and the "connection" was subsequently made by both oral testimony and by receipt in evidence of a tabulation of actual rents received during the period in question (pltfs. exh. 66 in evid.; E98).

Certainly, there was no error.

(iii). The court properly excluded Cities Service's proferred exhibit (E00 for id.; E148). It included inferences, and was for the purpose of arguing credibility.

This exhibit had no probative value (A1105, lines 5-7); it was not evidence, it was an argument (A1106). The court advised counsel

> "THE COURT: You, as counsel, may argue those numbers to them. You may even say to them, "I have added these up and this is what I get and here are the numbers," but I am not going to have a chart in this record that goes to the juryroom from which the jury could misconstrue something as being fact. It is marked in evidence. I am withdrawing it from evidence and I will have it marked for identification."

Its exclusion did not constitute error, certainly not reversible error.

F. Complaints of Improper Admission of Photographs (appellant's brief, p. 69) Are a Waste of This Court's Time.

At folio A641, cited by Cities Service, it consented to the particular photo being received in evidence. With respect to the photo marked plaintiff's exhibit 36, folio A632, the co-defendant

had no objection to its receipt in evidence (A635). Only Mr. Colin, not the judge, not the jury, not the witness, not the other lawyer, characterized the photo as unintelligible.

G. Contentions that the Court Improperly Interrogated Witnesses (appellant's brief, p. 62) Ignores Rule 614(b) of The Federal Rules of Evidence.

Rule 614(b) is self explanatory. It states

> "Interrogation by court. --The court may interrogate witnesses, whether called by itself or by a party."

H. Cities Service Contends that the Court Restricted it from Reading a Deposition (appellant's brief, p. 65). The Deposition Related to a Discussion of What was Said in a Document.

Objection was made on the grounds that the document was in evidence and spoke for itself. The trial court did not restrict the reading of the deposition. It sustained an objection to an improper line of questioning -- the document spoke for itself (A613-A615).

V. CONCLUSION

The judgment in favor of Doralee against Cities Service should be affirmed in all respects. The plaintiff proved each of its causes of action against Cities Service. The jury's award of compensatory and punitive damages were appropriate and the amount of damages in each instance was in full accord with the proofs. All of the jury's findings were in accordance with the weight of the evidence, and, in any event, the defendant never invoked the trial court's discretion for a new trial, for any reason, pursuant to the provisions of FRCP 59(b). Justice was done in all respects.

Respectfully submitted,

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AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 26 day of August ,19 77 at No. 70 Pine St., NYC 10005 and 233 Broadway, NYC

deponent servied the within Brief

upon Baer, Marks & Upham, Esqs. and James D. Ahern, Esq.

the Appellants herein, by delivering a true copy(ies) thereof to them personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellants therein.

Sworn to before me this
26 day of August 197 7

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978